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| APPLICATION NO.  | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO.   |  |  |
|--|-------------|----------------------|---------------------|--------------------|--|--|
| 10/731,284   | 12/09/2003  | Markus Nesper        | HOE-790             | 4912               |  |  |
| 20028  | 7590        | 03/11/2009           | EXAMINER            |                    |  |  |
| Lipsitz & McAllister, LLC<br>755 MAIN STREET<br>MONROE, CT 06468 |             |                      |                     | SHAFFER, RICHARD R |  |  |
| ART UNIT   |             | PAPER NUMBER         |                     |                    |  |  |
| 3775   |             |                      |                     |                    |  |  |
| MAIL DATE  |             | DELIVERY MODE        |                     |                    |  |  |
| 03/11/2009   |             | PAPER                |                     |                    |  |  |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|   |                        |                     |
|---|------------------------|---------------------|
| <b>Advisory Action<br/>Before the Filing of an Appeal Brief</b> | <b>Application No.</b> | <b>Applicant(s)</b> |
|   | 10/731,284             | NESPER ET AL.       |
|   | <b>Examiner</b>        | <b>Art Unit</b>     |
|   | Richard Shaffer        | 3775                |

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 19 February 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a)  The period for reply expires \_\_\_\_\_ months from the mailing date of the final rejection.
- b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because

- (a)  They raise new issues that would require further consideration and/or search (see NOTE below);
- (b)  They raise the issue of new matter (see NOTE below);
- (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: \_\_\_\_\_.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.

12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_

13.  Other: \_\_\_\_\_.

/Eduardo C. Robert/  
Supervisory Patent Examiner, Art Unit 3733

/Richard Shaffer/  
Examiner, Art Unit 3775

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's remarks regarding the 35 U.S.C. 103(a) rejection of Lerch DE in view of Lercher US are acknowledged, however they are not persuasive. In regard to applicant's assertion that the flexible member of Lerch DE is not a "flexible band," the examiner continues with the assertion that the flexible member of Lerch DE can be reasonably interpreted as being a flexible band. In regard to applicant's statement that the combination fails to disclose/teach first and second free ends of a tension band disposed above an outer surface and secured thereto via hook elements which penetrate completely through the free ends of the tension band, the flexible band of Lerch DE is fully capable of being positioned in the manner claimed and when the added hook elements of Lerch DE are placed on the abutment elements, one could penetrate through the member as one so desired. For a device claim, it matters not if the use is disclosed in the prior, only that the prior art device/combination is capable of performing the stated function. In regard to the applicant stating that the height of the hook elements are not greater than a height of the tension band and the tension band having a width that is at least five times greater than its height, at least in the area where the hook element(s) penetrate the tension band is also not persuasive. Applicant understands the examiner's position that the height can be a measurement perpendicular to its long dimension, with the long dimension being interpreted as being the width which is clearly at least five times greater than its height. In regard to applicant's arguments regarding Golds et al, applicant argues that Golds et al is non-analogous, that it could not penetrate completely through the flexible band and that it would not fit. The teaching gleaned from the Golds et al reference is that of a simple mechanism where a device with teeth are used to grip and hold a flexible member at a fixed tension. It matters not if the device as a whole is used for something different when the useful teaching is merely the way of holding a flexible member. This is why the assertion that the mechanism would not fit is not found persuasive as well, one would not be taking the exact structure from Golds et al and placing it within the device of Lerch DE, one of ordinary skill in the art would resize if not also reshape to appropriately fit the mechanism in the device of Lerch DE. Further, it is the examiner's position that if so desired, the teeth would be sufficient to penetrate completely through the tension band of Lerch DE.